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NAURAN ABDUL MAJID & ANOR
v. JABATAN PERKHIDMATAN PEMBENTUNGAN MALAYSIA & ORS

HIGH COURT MALAYA, SHAH ALAM
JULIE LACK J
B [CIVIL SUIT NO: BA-23NCvC-26-07-2018]
30 DECEMBER 2023

Abstract – *(i) In cases involving damage to property, the three fundamental questions to be considered by the courts are: (a) whether the damage is reasonably foreseeable; (b) whether there is a relationship of proximity between the claimant and the alleged tortfeasor; and (c) whether it is just, fair and reasonable to impose a duty in such a situation; (ii) The elements to establish the tort of trespass are: (a) there is an act of entering upon the land in the possession of the claimant; (b) the alleged tortfeasor remains upon such land; or (iii) There is the placing or projecting of any object on the land without lawful justification.*

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TORT: *Trespass – Damages – Claim for – Action by owners of land/claimants against contractor – Contractor appointed by Government to carry out works for project – Contractor entered claimants' land and dug manhole, destroyed trees, caused flooding, abandoned works and did not remove equipment from land – Whether there was trespass – Whether proven that contractor entered land in possession of claimants – Whether contractor remained upon land – Whether proven that contractor placed or projected objects on land without lawful justification*

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TORT: *Negligence – Duty of care – Breach – Action by owners of land/claimants against contractor – Contractor appointed by Government to carry out works for project – Contractor entered claimants' land and dug manhole, destroyed trees, caused flooding, abandoned works and did not remove equipment from land – Whether contractor owed duty of care to claimants – Whether contractor breached duty of care to claimants – Whether claimants suffered damages as result of breach of contractor's duty – Whether damages not too remote*

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TORT: *Damages – Claim for – Claim for damages based on trespass, negligence and breach of duty of care – Action by owners of land/claimants against contractor – Contractor appointed by Government to carry out works for project – Contractor entered claimants' land and dug manhole, destroyed trees, caused flooding, abandoned works and did not remove equipment from land – Whether claimants' claims successfully proven – Whether damages ought to be awarded*

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I

The plaintiffs instituted proceedings against the defendants for breach of their duty of care, negligence and for trespass onto the plaintiffs' land, resulting in damages and losses. However, the case against the first and third defendants were struck out, leaving only this claim against the second defendant set for trial. The plaintiffs were the legal and beneficial owners of a piece of land that was utilised as an orchard where coconut and banana trees were grown. The first defendant was a department under the Ministry of Energy, Green Technology and Water and was awarded a project known as 'Projek Cadangan Menaik Taraf dan Rasionalisasi Loji-loji Sedia Ada di Kawasan Tadahan Tampin Tengah, Negeri Sembilan' ('project'). The second defendant was appointed by the first defendant as the main contractor to carry out the works for the project. The third defendant was the consultant of the project, appointed by the first defendant to oversee the works. The second defendant had approached the plaintiffs, seeking consent to carry out the works. The plaintiffs gave their consent but they later discovered that: (i) the second defendant had entered the plaintiffs' land and dug a manhole thereon measuring 10 x 10 feet and approximately 20 feet deep, destroyed the trees, fruits trees and vegetation on the plaintiffs' land and had drained water out of the manhole onto the land thereby flooding the land and destroying the trees thereon. Further, the works carried out by the second defendant were not completed and abandoned and the second defendant had not removed its equipment and/or items from the land; and (ii) the soil removed from the manhole had eroded and flowed into the drainage on the land, thereby clogging the drains in the land which further caused flooding in the land. The first plaintiff lodged several police reports against the second defendant. This was followed by a letter to the second defendant, informing them about the condition of the land and notifying them that: (i) the consent by the plaintiffs for the second defendant to enter the land to carry out the works was withdrawn; (ii) any works carried out on the land without the consent of the plaintiffs would be deemed as trespass; and (iii) the second defendant was given 14 days to remedy and/or reinstate the land, including to cover the manhole. The second defendant failed/refused and/or omitted to comply with the said notice. The first plaintiff then wrote to the first defendant, informing the first defendant that, among others, if the first defendant did not ensure that the land was reinstated and/or remedied, the plaintiffs would take legal action against both the first and second defendants. The second defendant then wrote to the first plaintiff on 10 June 2016, seeking time until 31 October 2016 to complete the works and to remedy the land and/or offer a compensation of RM5,000 to the plaintiffs. The first plaintiff was not agreeable to this and claimed damages of RM100,000. To their dismay, the plaintiffs discovered in July 2016 that the second defendant had not heeded the plaintiffs' notice and had trespassed on the land and attempted to complete the works. The plaintiffs again notified the first defendant of this trespass. The second defendant wrote to the plaintiffs and

(i) clarified that the proposed manhole would not be sited on the land but the excavated area was for temporary works for pipe-jacking method only; and (ii) proposed payment of damages of RM10,000 and rental of RM2,500 per month from August 2016 to September 2016. The plaintiffs counter-proposed for: (i) one lump sum payment of RM10,000 as damages; (ii) proposed rental rate to be calculated from 16 March 2015 until the works were completed; (iii) offer of RM2,500 per month until the end of the project; and (iv) arrears from 16 March 2015 until 29 July 2016, amounting to RM40,000 to be paid immediately. The second defendant did not accept the counter-proposal. Hence, the present action. The second defendant's defence, *inter alia*, was, (i) since the project was undertaken for the benefit of the public and was carried out on the instructions of the first and third defendants, it could not be held responsible for the plaintiffs' woes; and (ii) the works it carried out was a Government project and as such, was caught under s. 38 of the Government Proceedings Act 1956 ('Act').

Held (allowing claim; awarding plaintiffs damages in aggregate sum of RM440,680 with interests and costs):

(1) The three principles of the *Caparo* test, explained in the case of *Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd*, existed and were present in the instant case and had been proven by the plaintiffs on a balance of probabilities. There was a proximity of relationship between the two parties whereby the second defendant admitted that they had sought permission to use the plaintiffs' land for a period of three months and they had proceeded to carry out the works within the boundary of the plaintiffs' land. The proximity of the relationship between the plaintiffs and the second defendant led to the irrefutable conclusion that the acts of the second defendant would cause damage to the plaintiffs. It was a foreseeable occurrence, in that, the second defendant knew that they could not and ought not to dig into the plaintiffs' land and that such act would inevitably cause damage and direct loss to the plaintiffs as a private landowner. In light of all three ingredients of the tort of negligence being met, it followed that the plaintiff had proven that the second defendant owed a duty to ensure that the works carried out were undertaken with due care to ensure the safety of the land in particular and that there was no hazard posed to the plaintiffs and its occupants and visitors to the land. More importantly, it was under a duty to ensure that the works carried out were duly carried out and completed in a timely manner. (paras 40, 41, 42 & 46)

(2) The plaintiffs had proven, on a balance of probabilities, that the second defendant did not complete the project within the time allocated pursuant to the contract. In the course of carrying out their work, the employees and servants of the second defendant had caused flooding to

the surrounding areas and had destroyed the plants and vegetation growing in the vicinity. They left an open trench, which was dangerous and harmful to anyone passing through the area. They also left their machineries and equipment behind even after the plaintiffs had withdrawn their consent to enter onto the land. The second defendant failed to rebut the plaintiffs' evidence on this issue. (paras 48 & 50)

(3) The plaintiffs' claim for trespass, starting from 16 June 2015 (after the expiry of three months expressly stated in the plaintiffs' letter to the second defendant dated 16 March 2015) had been made out. The second defendant did not make any request for an extension for consent to access the plaintiffs' land post 16 June 2015 but the second defendant's workers and employees continued to intrude into the plaintiffs' land. The second defendant's workers and employees entered into the land even after the plaintiffs had expressly withdrawn their consent to allow the second defendant onto the land *via* their notice dated 2 February 2016. (para 64)

(4) The second defendant could not avoid liability and hide behind their bare allegation that the works were for the public interest or that it was in accordance with the instructions of the third defendant. In the absence of the design drawings and plans, the second defendant offered no cogent evidence that the digging on the plaintiffs' land was in accordance with the instructions and directions of the third defendant. It was important for the second defendant to ensure that in carrying out the works, it incurred no damage to the land such as avoiding flooding or unnecessarily destroying its plants and vegetation thereon. It had a duty to ensure that any digging resulting in a trench/hole or dug-out was covered or closed up in order to prevent any untoward accident and harm to its owners and any other persons occupying the land. It had to ensure that the land was returned to its original structure. Since the second defendant had brought machines and equipment onto the land, it had the duty to remove these items upon completion of the works or upon consent being withdrawn for it to be on the land. Further, it was clear as day that the second defendant was not a Government body and thus, could not lay claim to any form of immunity under the Act. The second defendant was a company and could be sued for damages or compensation arising out of negligence or trespass in the execution of any works of construction or maintenance undertaken by the Government in the exercise of the said public duties. (paras 44, 45 & 47)

(5) The plaintiffs were awarded: (i) RM2,500 for loss of vegetation and damages caused due to flooding; (ii) RM2,500 per month from June 2015 to June 2018 (36 months) for the loss of rental, totalling to RM90,000; (iii) RM265,000 being costs of rectification; and (iv) RM80,000 being compensation for all the distress, inconvenience and hardship suffered. (paras 89-93 & 95)

Case(s) referred to:

Bonham-Carter v. Hyde Park Hotel Ltd [1948] 64 TLR 177 ***(refd)***

Government Of Malaysia & Anor v. Akasah Ahad [1985] CLJU 107; [1985] 1 LNS 107 FC ***(refd)***

PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd [2008] CLJU 679; [2008] 1 LNS 679 HC ***(refd)***

Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd [2013] 6 CLJ 958 CA ***(refd)***

Spektra Segmen Sdn Bhd v. TC Autoworld Sdn Bhd [2018[CLJU 880; [2018] 1 LNS 880 HC ***(refd)***

Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd [2019] 1 CLJ 42 FC ***(refd)***

Villa Putra Management Corporation v. Mayland View Sdn Bhd [2014] CLJU 1096; [2014] 1 LNS 1096 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 60(1), 101, 102, 103, 106, 114(g)

Government Proceedings Act 1956, ss. 7(3), 38

For the plaintiffs - Norliza Rasool Khan, Janice & Deyvinah Ganesalingam; M/s Liza Khan & Chambers

For the 2nd defendant - R Kengadharan; M/s R Kengadharan & Co

Reported by Lina E

JUDGMENT

Julie Lack J:

Introduction

[1] The plaintiffs instituted proceedings against the first, second and third defendants for breach of their duty of care, negligence and for trespass onto the plaintiffs' land in Tampin, Negeri Sembilan resulting in damage and losses suffered.

[2] The case against the first and third defendants was struck out on 12 February 2019, leaving only this claim against the second defendant set for trial.

[3] At the conclusion of trial, I found that the plaintiffs had succeeded in proving their case against the second defendant on a balance of probabilities and I allowed their claim with costs. The second defendant is aggrieved with that decision and has filed an appeal to the Court of Appeal.

[4] Here are the grounds of my judgment.

The Parties And The Background Facts

[5] The plaintiffs are the legal and beneficial owners of a piece of land known as TM 552, and with an address for service at No. 50, Kampung Tampin Tengah, 7300 Tampin, Negeri Sembilan Darul Khusus. At all material times, the land is utilised as an orchard where coconut and banana trees are grown.

[6] The first defendant is a department under the Ministry of Energy, Green Technology and Water and was awarded a project known as 'Projek Cadangan Menaiktaraf dan Rasionalisasi Loji-Loji Sedia Ada di Kawasan Tadahan Tampin Tengah, Negeri Sembilan, (the project). A

[7] By a contract entered into between the first defendant and the second defendant, the first defendant appointed the second defendant as the main contractor for the project in particular to carry out works on, *inter alia*, the land having site possession date from 2 January 2014 and it was scheduled to be completed by 2 July 2016. B

[8] At all material times, the third defendant was and/or is the consultant of the project appointed by the first defendant to oversee the works. C

[9] Sometime in March 2015, the second defendant approached the plaintiff seeking consent from the plaintiffs to enter into a portion of the land adjacent to the main road to carry out the works for the period of approximately three months. D

[10] The second defendant followed up with a letter dated 16 March 2015 to the first plaintiff seeking the consent of the plaintiffs to carry out the works and paid a sum of RM500 as a rental for the land.

[11] Sometime in January 2016, the plaintiffs discovered that: E

(i) the second defendant had entered on the land and dug a manhole thereon measuring 10 x 10 feet and approximately 20 feet deep;

(ii) the second defendant had destroyed the trees and vegetation on the land in particular the fruit trees growing thereon; F

(iii) the second defendant, through its servants and/or agents and/or employees, had drained the water out of the manhole onto the land thereby flooding the land and destroying the trees thereon;

(iv) the works carried out by the second defendant was and/or is not completed and abandoned; G

(v) the second defendant had not removed its equipment and/or items from the land;

(vi) the soil removed from the manhole has eroded and flowed into the drainage on the land thereby clogging the drains in the land which further causes flooding in the land. H

[12] The first plaintiff lodged several police reports against the second defendant. They followed that up with a letter to the second defendant dated 2 February 2016, informing the second defendant about the condition of the land and the abandoned works, including the manhole left uncovered. In this letter, the plaintiffs notified the second defendant that: I

(i) the consent by the plaintiffs for the second defendant to enter the land to carry out the works is withdrawn;

(ii) any works carried out on the land without the consent of the plaintiffs will be deemed as trespass;

(iii) the second defendant was given 14 days to remedy and/or reinstate the land including to cover the manhole.

[13] The second defendant failed/refused and/or omitted to comply with the said notice.

[14] The first plaintiff then wrote a letter dated 30 May 2016 to the first defendant, notifying the first defendant regarding the police reports and the notice contained in the letter dated 2 February 2016 to the second defendant and demanded that if the first defendant did not ensure that the land is reinstated and/or remedied, the plaintiffs will take legal action against both the first and second defendants.

[15] The second defendant wrote to the first plaintiff on 10 June 2016 seeking time until 31 October 2016 to complete the works and to remedy the land and/or offer compensation of RM5,000 to the plaintiffs.

[16] The first plaintiff replied *via* their solicitor's letter dated 17 June 2016, informing the second defendant that they were not agreeable to the second defendant's request to enter upon the land to complete the works and any entry thereon would be deemed as trespass. The plaintiffs further claimed damages of RM100,000.

[17] To their dismay, the plaintiffs discovered sometime in July 2016 that the second defendant had not heeded the plaintiffs' notice but had trespassed on the land and attempted to complete the works. As such by a letter dated 13 July 2016 to the first defendant, the plaintiffs notified the first defendant of the trespass by the second defendant. The plaintiffs also notified the first defendant of its negligence in failing to monitor the works by the second defendant and demanded that the first defendant take steps to ensure that the second defendant stop all works on the land, remove its equipment, cover the manhole, reinstate the land, quit possession of the land and to pay compensation for the damages in the land.

[18] As there was no response from the first defendant, the plaintiffs sent them a reminder letter dated 15 July 2016.

[19] The second defendant wrote to the plaintiffs' solicitors and clarified that the proposed manhole will not be sited on the land but that the excavated area was for temporary works for pipe jacking method only. In the same letter, the second defendant proposed payment of damages of RM10,000 and rental of RM2,500 per month from August 2016 to September 2016.

[20] *Via* email dated 8 August 2016 from the plaintiffs' solicitors to the second defendant, the plaintiffs counter-proposed, *inter alia*, as follows:

(i) one lump sum payment of RM10,000 as damages;

(ii) the proposed rental rate is to be calculated from 16 March 2015 until the works are completed;

(iii) offer of RM2,500 per month until the end of the project; and

(iv) arrears from 16 March 2015 until 29 July 2016 amounting to RM40,000 shall be paid immediately.

[21] The second defendant did not accept the counter-proposal.

[22] The plaintiffs' solicitor once again wrote a letter dated 9 January 2017 to the first defendant demanding for damages but there has been no reply received.

Plaintiffs' Claim

[23] As highlighted earlier, the plaintiffs' claim against the second defendant is for breach of duty of care, negligence and trespass.

[24] In para. 19 of the amended statement, the plaintiffs particularised the manner of trespass allegedly committed by the second defendant. It was contended that the second defendant had:

(i) entered onto the land including on 10 June 2016 to carry out works despite the plaintiffs having withdrawn their consent by way of a letter dated 12 February 2016;

(ii) attempted to carry out works on the land despite the first plaintiff having withdrawn her consent for it;

(iii) failed to remove their machinery and equipment from the land until to date.

[25] The plaintiffs further set out the duties owed by the second defendant jointly and/or severally with the first and third defendants as pleaded in para. 26 of the amended statement of claim. In particular, the second defendant had:

(i) the duty to ensure that the works carried out by the second defendant were in a timely manner and duly completed;

(ii) the duty to ensure that in carrying out the works, due care is taken to ensure the safety of the land, in particular that there is no hazard posed to the plaintiffs and/or occupants and visitors to the land;

(iii) the duty to ensure that in carrying out the works, no damage is occasioned to the land including to ensure that there is no flooding or unnecessary destruction of plants and vegetation thereon;

(iv) the duty to ensure that any trench thereon is properly hoarded and/or covered to prevent any accidents and harm to any occupiers and/or visitors thereon;

(v) the duty to ensure that any trench dug is duly covered upon completion of the works;

(vi) the duty to ensure that the works are not abandoned;

(vii) the duty to ensure that the machineries and equipment brought onto the land is monitored and kept safe and duly removed upon completion of the works;

(viii) the duty to ensure that their agents and/or servants do not enter the land except for the purpose authorised to carry out the works; and

(ix) the duty to prevent any trespass on the land by its agents and/or servants upon retraction of the consent to enter the land.

[26] As a result of breaching all of the above duties, the plaintiffs claim that they have suffered losses and damage.

[27] In this claim, the plaintiffs are seeking the following reliefs against the defendants jointly and/or severally:

(i) a declaration that the second defendant owed the plaintiffs a duty of care to ensure that in carrying out the works, the land is maintained and kept in a safe condition, in particular, to ensure that any manhole thereon is properly filled up and/or covered to prevent any accidents and harm to any occupiers and/or visitors thereon;

(ii) a declaration that the second defendant had trespassed onto the land;

(iii) an order that the second defendant take immediate steps to quit and vacate the land;

(iv) an order that the second defendant, whether through its agents, servants and/or otherwise, is restrained from entering onto the land to carry out the works or for any purpose whatsoever without the consent of the plaintiffs in writing;

(v) general damages to be assessed; and

(vi) aggravated damages due to trespass, nuisance and/or other opportunity loss of RM1,000,000 and/or to be assessed by this Honourable Court.

Summary Of The Second Defendant's Defence

[28] The second defendant has denied that it had committed trespass, nuisance or breached its duty of care to the plaintiffs. The essence of its defence is that:

(i) the plaintiffs' writ and statement of claim dated 12 July 2018 do not disclose a reasonable cause of action and lacked particulars;

(ii) the claim is barred pursuant to s. 38 of the Government Proceedings Act 1956;

(iii) the second defendant was appointed by the third defendant and as such they were bound by the instructions given to them by the third defendant;

(iv) the second defendant was also bound by the instructions of the first defendant;

(v) by reason of (iii) and (iv), the second defendant cannot be held liable for breach of duty and trespass of the excavation on the plaintiffs' land;

(vi) the losses claimed by the plaintiffs were outrageous and were not due to the works carried out by the second defendant; and

(vii) the plaintiffs failed to give notice of trespass before bringing this civil suit against the second defendant.

The Trial

[29] The trial of the claim was conducted over seven days *via* the Zoom video teleconferencing platform. The plaintiffs called five witnesses, and the second defendant called one witness. The plaintiffs' witnesses were the first plaintiff (PW1), her brother (PW3), a licensed surveyor (PW2) and two independent contractors (P4 and PW5).

[30] The second defendant's sole witness was Mr Logamurthy a/l Murugiah (DW1).

Issues To Be Tried

[31] These were the agreed issues to be tried.

(i) whether at all material times, the second defendant as the main contractor appointed by the first defendant to carry out the works under the contract merely acted on the instructions of the first and third defendants;

(ii) whether on the facts and circumstances of this matter, the second defendant owes the plaintiffs a duty of care;

(iii) whether the second defendant breached that duty of care owed to the plaintiff if any;

(iv) whether the second defendant had trespassed on the land/the property and the extent of the trespass if any; and

(v) quantum of damages.

Decision Of The Court

[32] It is trite law that he who alleges must prove and in a civil case, the standard of the burden of proof is on the balance of probabilities. Hence, in the instant case, it is the plaintiffs who bear the burden of proving negligence and the onus will only shift from the plaintiffs to the defendant to rebut by evidence once the plaintiffs succeed in discharging their burden to prove (see ss. 101, 102, 103 and 106 of the Evidence Act 1950). If the plaintiffs fail to prove, the action must fail.

Negligence/Duty Of Care

[33] The applicable law when dealing with allegations of a breach of duty of care and skill and negligence is trite. Three things must be proved to support the plaintiffs' claim:

(i) that the second defendant owes the plaintiff a duty of care;

(ii) that the second defendant is in breach of that duty of care; and

(iii) that the plaintiffs suffered damage as a result of that breach of duty and that damage is not too remote.

[34] In the case of *Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 6 CLJ 958, the Court of Appeal very capably explained the tort of negligence as follows:

> [68] According to Alderson B in *Blyth v. The Company of Proprietors of the Birmingham Waterworks* [1856] 11 Ex 781, 784:
>
> > Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.
>
> [69] The standard of conduct to determine negligence is that of the reasonable man. It is an objective test.
>
> [70] The *Caparo* test derived from the case of *Caparo Industries Plc v. Dickman and Others* [1990] 2 AC 605 is usually applied to cases involving physical injury and/or damage to property. The *Caparo* test requires the court to ask three basic questions:
>
> (a) Whether the damage is reasonably foreseeable?
>
> (b) Whether there is a relationship of proximity between the claimant plaintiff and the defendant?
>
> (c) Whether it is just, fair and reasonable to impose a duty in such a situation?

Whether The Second Defendant Owes A Duty Of Care To The Plaintiffs

[35] The plaintiffs have clearly pleaded *via* para. 8 of the amended statement of claim that the second defendant was appointed by the first defendant as the main contractor of the project, in particular, to carry out the work required and that the project was for the benefit of the public.

[36] The first plaintiff (PW1) and her brother, Encik Roshdan (PW3), gave oral evidence testifying to the fact that sometime in March 2015, the second defendant's employee/servant/agent one Encik Izham came to see her seeking permission to use a portion of the plaintiffs' land for a period of three months with regard to the use of the plaintiffs' land to carry out the project and to place their machineries. The second defendant followed that up with their letter dated 16 March 2015 for the same purpose. Paragraph 3 of the letter dated 16 March 2015 refers to the amount of rental the second defendant agreed to pay the plaintiffs. Paragraph 3 of the said letter is reproduced below:

> Projek Pembentungan sepenuhnya milik Kerajaan Malaysia ini dijangka mengambil masa selama 3 (tiga) bulan, bergantung kepada keadaan semasa dan tertakluk kepada pindaan. Namun pihak kami dengan segala initiative akan cuba menyiapkan projek ini dalam tempoh yang lebih singkat dan *berjanji akan membaiki segala kerosakan berkaitan yang mungkin akan berlaku di sekitar kawasan tanah milik tuan/puan.*
>
> *Bersama ini disertakan bayaran sewa tanah berjumlah RM500.00 (Lima Ratus Ringgit Malaysia).*
>
> (emphasis added)

[37] In the face of the contents of the abovesaid letter, it is quite baffling that DW1, the second defendant's only witness, denied any agreement to rent the plaintiffs' land. An excerpt of his evidence at pp. 597 and 598 of the notes of proceeding is reproduced below:

> PP : Dan surat ini Encik Loga diberi kepada Puan Nauran secara tangan, secara peribadi, betul?
>
> DW1 : Ya.
>
> PP : Oleh Encik Izham, betul?
>
> DW1 : Ya.
>
> PP : Jadi pada masa Encik lzham berjumpa dengan Puan Nauran Encik Loga tidak hadir?
>
> DW1 : Ya Yang Arif.
>
> PP : Dan jadi Encik Loga tidak tahu perbualan antara Encik lzham dengan Puan Nauran pada masa tersebut?
>
> DW1 : Tiada perbualan Yang Arif.

PP : Encik Loga tahu tak perbualan?

DW1 : Tidak Yang Arif.

PP : Jadi saya cadangkan bahawa Encik lzham ada memberi jaminan kepada Plaintif Pertama bahawa pampasan sewa akan diberi, betul? Saya cadangkan Encik Loga. Encik Loga setuju atau tidak?

DW1 : Saya tidak setuju Yang Arif.

PP : Tapi Encik Loga tak tahu dan Encik Loga tak ada masa tersebut, betul?

DW1 : Tidak Yang Arif.

PP : Encik Loga, adakah Encik Loga pernah bertemu dengan mana-mana 3 Plaintif berkenaan projek ini?

DW1 : Tidak Yang Arif.

PP : Tadi kan Encik Loga ada kata terdapat, sorry, boleh Encik Loga terangkan sama ada terdapat Pejabat Tapak, site office yang ditubuhkan untuk projek ini?

DW1 : Ada Yang Arif.

PP : Dan adakah tapak ini di Taman Indah, Tampin?

DW1 : Ya Yang Arif.

PP : Adakah Encik Loga selalu ke tapak ini?

DW1 : Pejabat tapak, ya.

PP : Berapa kerap Encik Loga?

DW1 : Sekiranya ada keperluan Yang Arif.

PP : Semasa Encik Loga berada di Pejabat tapak pada bila-bila masa Encik Loga setuju tak pernah jumpa atau terserempak dengan Plaintif-plaintif?

DW1 : Tidak Yang Arif.

[38] DW1 conceded that the three-month period referred to in the said letter was for a period from 16 March 2015 to 15 June 2015.

[39] In fact, DW1 gave explicit evidence that the second defendant, as the main contractor, was responsible for digging up the manhole on the plaintiffs' land and also that the second defendant had the duty to remedy the manhole left on the land. His admission is found in p. 626 of the notes of proceeding:

PP : B1. Enclosure 115. Setuju Encik Loga bahawa lubang yang jelas terlihat di muka surat 267 dikorek semasa projek ini?

DW1 : Ya setuju.

PP : Dan ianya dikorek oleh Defendan Kedua sebagai kontraktor?

DW1 : Ya.

PP : Dan setuju jika saya cadangkan bahawa adalah tanggungjawab Defendan Kedua untuk memperbaiki lubang ini?

DW1 : Ya setuju.

[40] From the facts and the evidence adduced, I am satisfied and I make the finding that the three principles (*Caparo* test) explained in the case of *Project Lebuh Raya Utara-Selatan* (*supra*) exist and are present in the instant action and have been proven by the plaintiffs on a balance of probabilities.

[41] It is the finding of this court that there is a proximity of relationship between the two parties whereby the second defendant admitted that they had sought permission to use the plaintiffs' land for a period of three months and they had proceeded to carry out the works within the boundary of the plaintiffs' land.

[42] In consequence of that, this court finds that the proximity of the relationship between the plaintiffs and the second defendant led to the irrefutable conclusion that the acts of the second defendant would cause damage to the plaintiffs. It was a foreseeable occurrence in that the second defendant knew that they could not and ought not to dig into the plaintiffs' land and that such an act would inevitably cause damage and direct loss to the plaintiffs as a private landowner.

[43] The second defendant's main subsidiary contention is that it cannot be held liable for any alleged losses suffered by the plaintiffs. The defendant maintained the position that since the project was undertaken for the benefit of the public and was carried out on the instructions of the first and third defendants, it cannot be held responsible for the plaintiffs' woes.

[44] It is imperative to note that the second defendant had not, for the duration of the trial, produced its contract with the third defendant to show that the second defendant was bound by the instructions of the third defendant. The second defendant also could not show that the works carried out were for the public interest and that they were bound to carry out the works in accordance with the plan given to them by the third defendant. The second defendant failed to show that the design and drawings pertaining to the project were imposed upon them to comply with. The second defendant also failed to show proof that they were instructed by the third defendant to enter into the plaintiffs' land in order to carry out and complete the project. In the absence of all of the above, the second defendant cannot now avoid liability and hide behind their bare allegation that the works were for the public interest or that it was in accordance with the instructions of the third defendant. In the absence of the design drawings and plans, the second defendant offered no cogent evidence that the digging on the plaintiffs' land was in accordance with the instructions and directions of the third defendant.

[45] The second defendant's other subsidiary defence was that the works it carried out is a Government project and, as such, is caught under s. 38 of the Government Proceedings Act 1956. It is clear as day that the second defendant is not a Government body and thus cannot lay claim to any form of immunity under the Government Proceedings Act 1956. The second defendant is a company and can be sued for damages or compensation arising out of negligence or trespass in the execution of any works of construction or maintenance undertaken by the Government in the exercise of the said public duties (see s. 7(3) of the Government Proceedings Act 1956).

[46] In light of all three ingredients of the tort of negligence being met it followed that the plaintiffs have proven that the second defendant owed a duty to ensure that the works carried out were undertaken with due care to ensure the safety of the land in particular and that there is no hazard posed to the plaintiffs and its occupants and visitors to the land. More importantly, it was under a duty to ensure that the works carried out were duly carried out and completed in a timely manner.

[47] It is important also for the second defendant to ensure that in carrying out the works, it incurred no damage to the land such as avoid flooding or unnecessarily destroy its plants and vegetation thereon. It had a duty to ensure that any digging resulting in a trench/hole or dug-out is covered or closed up in order to prevent any untoward accident and harm to its owners and any other persons occupying the land. It had to ensure that the land was returned to its original structure. Since the second defendant had brought machines and equipment onto the land, it had the duty to remove these items upon completion of the works or upon consent being withdrawn for it to be on the land.

Whether The Second Defendant Had Breached Its Duty Of Care Owed To The Plaintiffs

[48] The plaintiffs have proven on a balance of probabilities that the second defendant did not complete the project within the time allocated pursuant to the contract. In the course of carrying out their work, the employees and servants of the second defendant had caused flooding to the surrounding areas and had destroyed the plants and vegetation growing in the vicinity. They left an open trench which was dangerous and harmful to anyone passing through the area. They left their machineries and equipment behind even after the plaintiffs had withdrawn their consent to enter onto the land.

[49] PW1, in her evidence at pp. 508 and 509 of the NOP, explained the damage that was caused on the land:

PP : Boleh Puan Nauran merujuk kepada afidavit Encik Baharudin, 120? Puan Nauran jumpa? Kandungan 120, Afidavit Baharudin.

PW1 : Sudah jumpa.

PP : Puan Nauran lihat muka surat 31 dalam dokumen ini. Boleh Puan Nauran jelaskan apakah yang gambar ini menunjukkan?

PW1 : Gambar ini menunjukkan lubang yang telah digali tapi sudah dipenuhi oleh rumput-rumput dan pokok-pokok macam pokok belukar. Jadi tak nampak sangat, tak jelas. Memang lubang yang digali itu.

PP : Puan Nauran, Puan Nauran telah ditanya berkali-kali pada tarikh-tarikh yang Puan Nauran beri keterangan tentang perkataan-perkataan parit dan manhole serta longkang dan seterusnya.

PW1 : Ya.

PP : Di mana dicadangkan kepada Puan Nauran bahawa manhole itu bukan parit. Puan Nauran ingat soalan tersebut?

PW1 : Ya.

PP : Bolehkah Puan Nauran jelaskan adakah terdapat korekan atas tanah Puan Nauran?

PW1 : Ada korekan. Itu tinggal lubang itu. Lubang yang sudah terbiar.

PP : Boleh Puan Nauran rujuk kepada lkatan B1 muka surat 267? Puan Nauran jumpa?

PW1 : 267 jumpa.

PP : Boleh Puan Nauran jelaskan apakah gambar ini?

PW1 : Gambar lubang. Gambar lubang yang digali dan ditutup dengan kayu dan dawai. Lubang yang telah digali.

PP : Puan Nauran, adakah ini subjek tuntutan Puan Nauran dalam kes ini?

PW1 : Ya subjek.

[50] The second defendant abysmally failed to rebut the plaintiffs' evidence on this issue. To compound matters, DW1 admitted in his evidence that he had never visited the lands after the project started. Therefore, his denial of any excavation on the land is baseless and must be disregarded in its entirety. His admission is found in pp. 575 and 576 of the NOP and reproduced here for easy reference:

PP : Selain daripada tadi Encik Loga kata pernah ke tanah tersebut sebelum projek itu bermula, selain daripada itu ada pernah jelajahi tanah 31 tersebut?

DW1 : Tidak Yang Arif.

PP : Selain daripada tadi Encik Loga kata pernah ke tanah tersebut sebelum projek itu bermula, selain daripada itu ada pernah jelajahi tanah tersebut?

DW1 : Tidak Yang Arif.

[51] DW1 agreed with learned counsel for the plaintiffs when she challenged him that the plans were not followed when the second defendant's workers dug up the earth inside the plaintiffs, land, resulting in the manhole being created. In the plans, the manhole should have been dug outside the plaintiffs' land and not inside. The admission by DW1 is found at pp. 609 and 610 of the NOP and reproduced below:

PP : Kita lihat muka surat 265 to 270.

DW1 : Same bundle?

PP : Bundle B1. Khususnya 267.

DW1 : Gambar?

PP : Gambar. Saya cadangkan Encik Loga bahawa ini adalah gambar lubang yang dikorek dalam tanah Plaintif-plaintif.

DW1 : Ya Yang Arif.

PP : Sekarang Encik Loga di Ikatan B2, kita lihat muka surat 296. Jumpa?

DW1 : Ya Yang Arif.

PP : Encik Loga, ini adalah surat daripada Pembinaan Daya Tekad Sdn Bhd, Defendan kedua Encik Loga dalam kes ini kepada Defendan Ketiga Ciptamas Consult Sdn Bhd, betul?

DW1 : Ya Yang Arif.

PP : Bertarikh 15 Februari 2017. Ya? Correct the date Encik Loga?

DW1 : Ya.

PP : Dan jika Encik Loga lihat muka surat 297 ditandatangani oleh Hadzlee Auli.

DW1 : Ya Yang Arif.

PP : Adakah Encik Loga mempunyai pengetahuan peribadi, personal knowledge, tentang surat ini?

DW1 : Ya Yang Arif.

PP : Dan Encik Loga terlibat dalam penyediaan surat ini?

DW1 : Ya Yang Arif.

PP : Lihat kepada perenggan pertama. Before that, surat ini Encik Loga dalam header, dalam tajuk surat ini projek yang dirujuk adalah projek dalam kes ini Encik Loga, betul?

DW1 : Ya.

PP : Dan kontrak pun kontrak dalam kes ini, betul?

DW1 : Ya Yang Arif.

PP : Dan construction of MH-2-36B adalah manhole yang sepatutnya sebelah tanah Plaintif-plaintif, betul?

DW1 : Ya Yang Arif.

PP : Di perenggan pertama Encik Loga setuju bahawa surat ini menyatakan bahawa Defendan Kedua telah meneliti location pit tersebut dan mendapati bahawa pit yang dirujuk sebagai MH-26B is indeed located 26 within the private property of the owner Puan Nauran binti Abdul Majid. Correct it says that Encik Loga? Betul?

DW1 : Ya Yang Arif.

All the more compelling is the evidence of DW1 as follows:

PP : Jadi bila anda melihat gambar ini Encik Loga di muka surat 267, 4 gambar yang pertama di atas, setuju jika saya katakan sekiranya terdapat hujan lebat lubang ini akan dipenuhi air?

DW1 : Setuju.

PP : Dan air tersebut boleh melimpah ke kawasan sekelilingnya, setuju Encik Loga?

DW1 : Tidak setuju.

PP : Tidak setuju. Jadi air tersebut akan mengalir ke mana Encik Loga?

DW1 : Boleh saya beri penjelasan Yang Arif sebab ini melibatkan teknikal?

YA : Ya.

DW1 : Di dalam pit yang dikorek, pit adalah satu struktur sementara, di dalam pit yang dikorek terdapat drainage sump, sump longkang yang kita menggunakan pam. Sekiranya air melebihi tahap ke dalam air tersebut akan secara automatik akan dipam keluar ke parit berhampiran sebab kalau air tertakung tinggi ia akan merosakkan mesin yang berada di dalam pit tersebut dan tidak dapat menjalankan kerja-kerja pemasangan.

PP : Ok, soalan saya yang seterusnya Encik Loga, parit yang berdekatan dengan pit ini adalah parit yang Encik Loga tunjuk tadi dalam tanah Plaintif-plaintif?

DW1 : Ya.

PP : Parit di tengah-tengah.

DW1 : Ya.

PP : Jadi air akan dipam keluar dan dibuang ke dalam parit yang berada 5 dalam tanah Plaintif-plaintif, setuju?

DW1 : Parit milik JPS di tanah Plaintif. Parit itu adalah milik JPS, kerajaan.

[52] Earlier in his testimony, DW1 did not dispute that the manhole had been excavated by the second defendant. His evidence leaves no room for doubt:

PP : B1. Enclosure 115. Setuju Encik Loga bahawa lubang yang jelas terlihat di muka surat 267 dikorek semasa projek ini?

DW1 : Ya setuju.

PP : Dan ianya dikorek oleh Defendan Kedua sebagai kontraktor?

DW1 : Ya.

PP : Dan setuju jika saya cadangkan bahawa adalah tanggungjawab Defendan Kedua untuk memperbaiki lubang ini?

DW1 : Ya setuju.

PP : Setuju jika saya cadangkan bahawa tidak ada langkah diambil oleh Defendan Kedua untuk menimbun atau menutup lubang ini?

DW1 : Tidak.

PP : Encik Loga tidak setuju tapi ada gambar menunjukkan sudah ditembus?

DW1 : Tiada arahan.

PP : Jadi Encik Loga tidak tahu sebenarnya.

[53] It is clearly evident that DW1 did not deny the breach except to justify the second defendant's actions in following the instructions of the first and third defendants. In my view, this defence has remained unproven.

[54] Having perused the contemporaneous documents and the evidence of the witnesses, I am compelled to hold that the second defendant was aware and had full knowledge that they had not obtained the consent of the plaintiffs before digging the manhole inside of the plaintiffs' land. DW1 confirmed that the minutes of the meeting (pp. 382 to 406 B2) signed off by their employee showed that the manhole was dug in the plaintiffs' land without the plaintiffs' consent and the hole has not been covered to date. The issue of the manhole again came up in a letter dated 15 May 2018 (p. 303 B2) between the second and the third defendant. Reference is made to para. 2 of the said letter which reads as follows:

> **We are fully aware of the situation of the existing manhole pit which is located at the private lot** and the issue surrounding the requirement of having the manhole relocated. We have also had several discussions with your previous resident engineer and your project engineer on having to shift the pit and manhole location due to the issue.
>
> (emphasis added)

[55] Most undoubtedly the second defendant had excavated in the plaintiffs' land and had dug out the manhole as seen in the photographs tendered into court. As such, the court is firmly of the view that all these

contemporaneous documents together with the evidence of DW1 show beyond doubt that there was a breach of duty on the part of the second defendant and they had failed to take steps to remedy the breach.

[56] During the course of the trial, concerns were raised as to whether the 'hole' excavated on the plaintiffs' land was to be described as a 'manhole', a 'pit' or a 'trench'. In my view, this wordplay bore no detrimental consequence to the plaintiffs' case as all parties were aware and not confused nor misled in regard to that fact. There is no prejudice occasioned by the usage of the words to describe the hole within the plaintiffs' land. Given the circumstances, I find that the plaintiffs had pleaded accordingly and did not exceed the bounds of pleadings in the amended statement of claim.

[57] In fact, DW1 had conceded that there was indeed a 'hole' that was dug on the land by the second defendant and that the hole remains to date. I have also noted that the words 'pit' and 'manhole' have been referred to interchangeably by the plaintiffs and the defendants alike *via* their oral testimonies and letters. I find there was no prejudice caused to the second defendant by the use of the words to describe the hole excavated.

[58] Having carefully considered and weighed both the oral and documentary evidence adduced by the parties, it is the finding of this court that the vital ingredients for breach of duty of care and negligence have been made out and unrebutted by the second defendant.

Whether The Second Defendant Had Trespassed On The Plaintiffs' Land

[59] Every unlawful entry by a person on land in the possession of another is a trespass for which an action lies. The elements to establish the tort of trespass have been clearly stated in the Federal Court case of *Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd* [2019] 1 CLJ 42; [2019] 1 MLJ 1 as follows:

(i) entering upon land in the possession of the plaintiff;

(ii) remaining upon such land; or

(iii) placing or projecting any object on or over it, in each case without lawful justification.

[60] The Federal Court defined trespass in this manner:

> [21] Before we dwell on the issue raised by learned counsel for the appellant, it would be useful to briefly state the law on *trespass*. *Halsbury's Laws of England* (4th Ed) Vol 45 gives a definition of trespass under the head of '*Wrongs to Property*' at para 1384 at p 63: Unlawful Entry. Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, even though no actual damage is done. A person trespasses upon land if he wrongfully sets foot on it, rides or drives over it or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or if he

A erects or suffers to continue on his own land anything which invades the airspace of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own onto another's land.

[61] In *Spektra Segmen Sdn Bhd v. TC Autoworld Sdn Bhd* [2018] CLJU 880; B [2018] 1 LNS 880, it was observed that it would be "wrong to assume that no one can be liable for trespass unless he has notice that he is trespassing". The court went so far as to hold that the trespasser is liable even when he does not know that he is trespassing or that he does not know he has no right in law to be there.

C **[62]** The plaintiffs' case for trespass has been pleaded and can be seen from the facts pleaded in paras. 19 to 21 of the amended SOC which are reproduced below:

19. However, in or about July 2016 and based on the construction plan provided by the second defendant, the plaintiffs discovered that the D second defendant had trespassed on the land and attempted to complete the Works.

Particulars of Trespass by the second defendant

19.1 entered the land including on 10 June 2016 to carry out works despite the plaintiffs having withdrawn their consent by way of a letter dated E 22 February 2016

19.2 attempted to carry out works on the land despite consent by the first defendant being withdrawn; and

19.3 failure to remove the machinery and equipment from the land to F date.

20. As such, by a letter dated 13 July 2016 from the first plaintiff to the first defendant, the first plaintiff notified regarding the trespass by the second defendant. The first plaintiff also notified the first defendant of its negligence in failing to monitor the Works by the second defendant and demanded that the first defendant takes steps to ensure that the G second defendant stop all works on the land, remove its equipment, cover the manhole, reinstate the land, quit possession of the land and to pay compensation for the damages in the land.

21. As there was no response from the first defendant, the first plaintiff sent a reminder letter dated 15 July 2016 to the 1st defendant.

H **[63]** The trespass by the second defendant has been proven by the following evidence.

(i) PW4, a subpoena witness, gave uncontroverted evidence that he saw a hole in the plaintiffs' land when he conducted a survey at the location.

I (ii) DW1 testified that the second defendant's workers had entered into the plaintiffs' land prior to the commencement of the project without first obtaining consent from the owners.

(iii) DW1 confirmed that the minutes of several meetings dating back from 2016 up to 2018 (pp. 382 to 406 B2) in which the second defendant took part of showed that the manhole was dug inside of the plaintiffs' land without the plaintiffs' consent and the hole had not been covered to date.

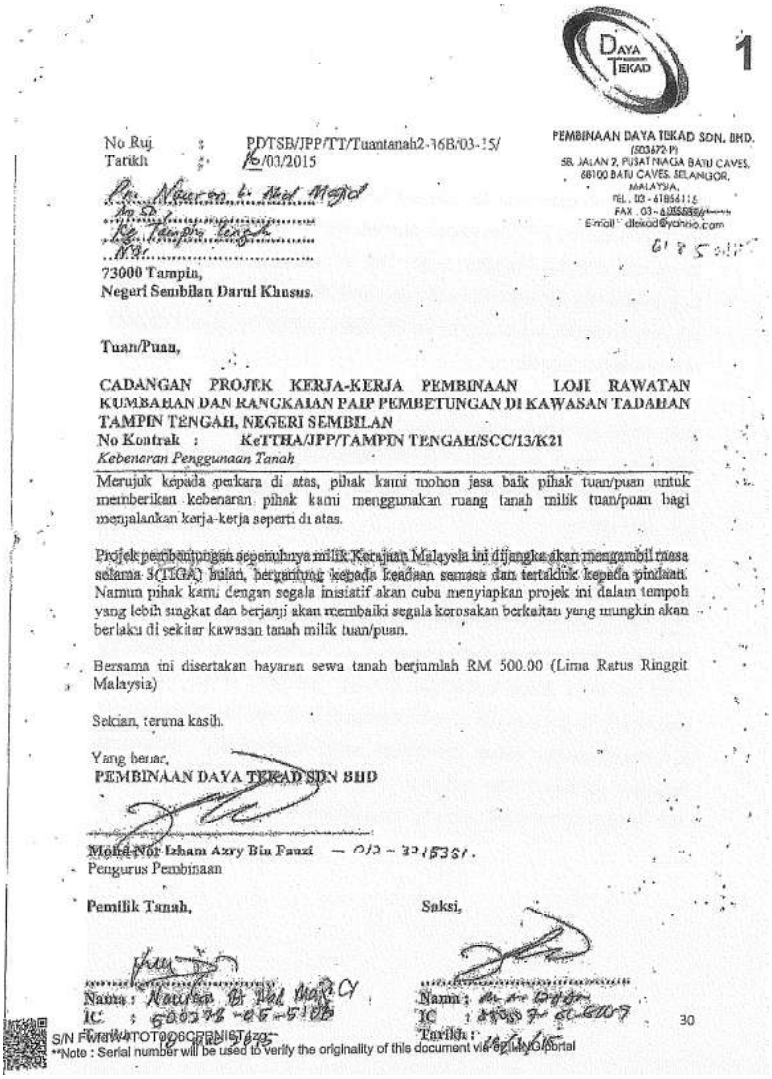
(iv) the issue of the manhole is also found in the letter between the second and third defendant dated 15 May 2018 (pp. 303 to 304 B2).

(v) DW1 admitted that the machinery was kept on the plaintiffs' land for the duration of the project but claimed that the workers had removed the machinery thereafter. The plaintiffs refuted DW1's testimony and stated that there were still remnants of the equipment such as the sheet piles left behind. There is no evidence to substantiate the second defendant's assertion. It is noticeable that DW1 could not confirm with certainty that all the machinery and sheet piles had been removed as he had never been to the land. Since the second defendant failed to offer any assertive evidence of the same and could not provide any documentary evidence in regard to its removal, that evidence remains as hearsay evidence and no weight will be given to it.

[64] Consequently, this court finds that the plaintiffs' claim for trespass starting from 16 June 2015 (after the expiry of three months expressly stated in the plaintiffs' letter to the second defendant dated 16 March 2015) had been made out. The court further finds that the second defendant did not make any request for an extension for consent to access the plaintiffs' land post 16 June 2015 but the second defendant's workers and employees still continued to intrude into the plaintiffs' land. The second defendant's workers and employees entered into the land even after the plaintiffs had expressly withdrawn their consent to allow the second defendant onto the land *via* their notice dated 2 February 2016.

[65] Quite apart from entering onto the plaintiffs' land, the second defendant had dug a manhole in the plaintiffs' land without the consent of the plaintiffs. From the evidence tendered, the manhole still remains on the land to date.

[66] It is worth noting that the consent given from 16 March 2015 to 15 June 2015 was merely for the second defendant to store their machinery on the land. There was never any consent given to the second defendant to excavate the land, let alone leave a manhole behind. The letter dated 16 March 2015 specifically states that the consent was sought to use the plaintiffs' land to "menggunakan tanah tuan/puan untuk menjalankan kerja-kerja tersebut di atas." The contents of the second defendant's letter dated 16 March 2015 is reproduced below for easy reference:



DAYA TEKAD

1

PEMBINAAN DAYA TEKAD SDN. BHD.
(503672-P)
SB. JALAN 2, PUSAT NIAGA BATU CAVES,
68100 BATU CAVES, SELANGOR,
MALAYSIA.
TEL : 03-61856111
FAX : 03-6185588
E-mail : diekad@yahoo.com

No Ruj : PDTSB/JPP/TT/Tuantanah2-16B/03-15/
Tarikh : 16/03/2015

Pn. Nauran bt Abd Majid
No 58,
Kg. Tampin Tengah
[illegible]
73000 Tampin,
Negeri Sembilan Darul Khusus.

Tuan/Puan,

CADANGAN PROJEK KERJA-KERJA PEMBINAAN LOJI RAWATAN KUMBAHAN DAN RANGKAIAN PAIP PEMBETUNGAN DI KAWASAN TADAHAN TAMPIN TENGAH, NEGERI SEMBILAN
No Kontrak : KeTTHA/JPP/TAMPIN TENGAH/SCC/13/K21
Kebenaran Penggunaan Tanah

Merujuk kepada perkara di atas, pihak kami mohon jasa baik pihak tuan/puan untuk memberikan kebenaran pihak kami menggunakan ruang tanah milik tuan/puan bagi menjalankan kerja-kerja seperti di atas.

Projek pembentungan sepenuhnya milik Kerajaan Malaysia ini dijangka akan mengambil masa selama 3(TIGA) bulan, bergantung kepada keadaan semasa dan tertakluk kepada pindaan. Namun pihak kami dengan segala inisiatif akan cuba menyiapkan projek ini dalam tempoh yang lebih singkat dan berjanji akan membaiki segala kerosakan berkaitan yang mungkin akan berlaku di sekitar kawasan tanah milik tuan/puan.

Bersama ini disertakan bayaran sewa tanah berjumlah RM 500.00 (Lima Ratus Ringgit Malaysia)

Sekian, terima kasih.

Yang benar,
PEMBINAAN DAYA TEKAD SDN BHD

Mohd Nor Izham Azry Bin Fauzi — 013 - 3218381.
Pengurus Pembinaan

Pemilik Tanah,

Nama : Nauran Bt Abd Majid
IC : 600328-05-5128

Saksi,

Nama : [illegible]
IC : [illegible]
Tarikh : 16/3/15

30

S/N FwaWTOTQQ6CPBNISTZ2S
**Note : Serial number will be used to verify the originality of this document via eg.my.gov portal

[67] The second defendant knew that they were not supposed to excavate the manhole inside of the plaintiffs' land. This is substantiated by the plans issued by the third defendant of the works. The plans found in p. 271 B2 shows that the manhole was to be located outside the boundary of the plaintiffs' land. This is borne out by the minutes of the meeting (pp. 382 to 406 B2) in which the second defendant was directed to rectify their mistake.

[68] The evidence of PW2 in regard to his survey report dated 14 December 2017 (p. 561 B3) further confirmed that the manhole is within the boundary of the plaintiffs' land based on the coordinates of the land as

stated in the land title. The second defendant should not be allowed to challenge the evidence of PW2 merely because he did not bring along his license during the trial. This court is satisfied from his evidence that he had personal knowledge of the contents of the survey report as he and his staff had examined and discussed the minutes and field notes first before preparing the survey report. I accept his explanation that the survey that he carried out was not a title survey and as such did not fall within the ambit of the Licensed Land Surveyors Act 1958.

[69] Returning to the pivotal question, it must not be forgotten that the second defendant's own defence showed that they did not deny the trespass safe to say that it was carried out in the public interest. As I have highlighted earlier there is no dispute that the plaintiffs' are the owners of this land. Hence, the second defendant's reference and use of the case of *Government Of Malaysia & Anor v. Akasah Ahad* [1985] CLJU 107; [1985] 1 LNS 107; [1986] 1 MLJ 396 is without merit. What distinguishes the instant case with the case of *Akasah* is that the respondent (*Akasah*) did not own the land in question, whereas the plaintiffs are the registered owners of theirs. I reiterate here that the plaintiffs earlier consent given to the second defendant was expressly revoked by their letter dated 2 February 2016.

[70] The second defendant has raised the contention that the presence of a stream on the land was a matter that involved the Department of Irrigation and Sewage and reminded the plaintiffs that the right of way enjoyed by the second defendant is not a gratuitous license nor a contractual license. This contention was not pleaded nor proven by the second defendant. The unvarnished truth is that the plaintiffs are the legal and registered owners of the land and have exclusive enjoyment of the land and the second defendant could not bring forth any evidence to show that the plaintiffs had consented to the digging of the manhole or to damage and destroy the land. Nothing can override the documentary evidence which showed that the second defendant was directed by the other defendants to carry out remedial works on the damage caused to the plaintiffs' land.

[71] I find taking into consideration all of the above factors that there is incontrovertible evidence from the oral and documentary evidence the second defendant had trespassed onto the plaintiffs' land with impunity. The trespass has continued from 16 March 2015 unabated until to date.

[72] I am wholly in agreement with the plaintiffs' submission that an adverse inference should be drawn against the second defendant pursuant to s. 114(g) of the Evidence Act 1950 for the failure to produce a number of key individuals who were directly involved in their dealings with PW1 and PW3 in regard to the land. None of the witnesses who were involved in meeting and discussing the matter with PW1 and PW3 were called to give evidence. They were Balamurugan Ramasamy, Izham, Hadzlee Auli bin Mohd Nadzir, Mohd Nadzir bin Mansor, Pong Kok Chooi and Louis De Cruz to name a few. These individuals are the best witnesses to shed light

on the dispute and the circumstances leading to it. They could have cleared any doubt whether there was an oral conversation in regard to the use of the plaintiffs' land and compensation for the same. These witnesses are material to the facts of the present case and could have lent credence to the second defendant's narrative. The second defendant did not proffer any reasons for the non-calling of these material witnesses. I can only surmise that these individuals if called would have given evidence not in favour of the second defendant.

[73] Before I depart this subject, I wish to record my findings on the second defendant's sole witness in this proceeding.

[74] I found DW1 to be not a helpful witness for the second defendant. From my assessment of his evidence on the witness stand, I found that he did not have personal knowledge of this claim brought by the plaintiffs. He had never met the plaintiffs and neither did he have any personal interaction with the plaintiffs at the material time. He did not have personal knowledge of the matters of the evidence he gave at the trial. Truth be told, he is not an employee, director or a shareholder of the second defendant. He is the director of Visi Nusajaya Sdn Bhd, a contractor appointed by the second defendant. He had no personal knowledge of the matters relating to the second defendant. He truthfully stated that he had no knowledge of the affairs of the second defendant and had no connection whatsoever to the second defendant. This evidence is found at p. 562 of the NOE, reproduced here as follows:

> PP : Jadi betul tak jika saya katakan Encik Loga bahawa Encik Loga tiada pengetahuan peribadi tentang perkara-perkara yang melibatkan syarikat Pembinaan Daya Tekad Sdn Bhd?
>
> DW1 : Tidak Yang Arif
>
> PP : Tiada, terima kasih Encik Loga. Betul Encik Loga jika saya katakan Encik Loga tiada kaitan dengan Pembinaan Daya Tekad sebagai Direcktor atau pun pemegang saham?
>
> DW1 : Ya Yang Arif.

[75] DW1 never took part in all the meetings held by the second defendant, and he did not visit the land when the dispute was ongoing. His evidence at its best is hearsay and is in admissible as it contravenes s. 60(1) of the Evidence Act 1950.

[76] All things considered, it is the view of this court that even without any adverse inference as aforesaid, the other evidence adduced has established a sufficient case of negligence and trespass against the second defendant.

[77] Having carefully weighed the oral and documentary evidence adduced by the parties and considered the written submissions as well as the authorities filed therein, it is my considered view that the plaintiffs have

proven their pleaded case on a balance of probabilities against the second defendant. I reject the second defendant's defence, finding it devoid of merits interspersed with bare assertions and afterthoughts.

Quantum Of Damages

[78] This finally brings us to the issue of loss and damage. The plaintiffs assert that they have suffered losses and damage and have set out in para. 30 of their amended SOC the particulars thereof:

No.	Items	Amount (RM)
1.	Cost of rectification works	265,000.00
2.	Surveying cost	3,180.00
3.	Loss of rental @RM2,500.00 per month from June 2015 to June 2018 (36 months)	90,000.00
4.	Loss of vegetation and damage due to flooding	10,000.00
5.	Damages for trespass	100,000.00
6	Legal Fees	36,000.00
	Total	504,180.00

[79] In any claim for damages, the person seeking a claim has the burden of proving both the facts and the amount of damages before he can recover them (see *PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd* [2008] CLJU 679; [2008] 1 LNS 679; [2009] 7 MLJ 681).

[80] It is trite that it is the duty of the plaintiffs to prove their losses. "It is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it." (*Bonham-Carter v. Hyde Park Hotel Ltd* [1948] 64 TLR 177 p. 178). The damages must be proven with factual evidence. No amount of estimates or general conclusions will suffice.

[81] Be that as it may, the court takes note that damages need not be proven for a claim in trespass. In *Villa Putra Management Corporation v. Mayland View Sdn Bhd* [2014] CLJU 1096; [2014] 1 LNS 1096; [2015] 9 MLJ 779, the court reiterated the principle that the tort of trespass to land is a tort which is actionable *per se* and that damages need not be proven for the tort to be made out.

[82] In this regard, the plaintiffs led evidence of the losses suffered as a result of the second defendant's negligence and trespass on the land through PW1.

[83] The second defendant had left a gaping manhole in the ground and they left without filling it up. The area where the second defendant chose to set up their workstation is an orchard where various fruit trees are grown and

cultivated. PW1 alleged that the second defendant had chopped off two coconut trees and three banana trees that were laden with fruits in order to dig the manhole. PW1 also realised that the second defendant's workers had pumped water out of the manhole and flooded the surrounding land which caused the area to be soggy and water-logged. PW1 gave extensive evidence that a pump was placed on her land and water was pumped out of the manhole which led to the flooding. The plaintiffs filed a total of three police reports which contemporaneously documented their grievances with the actions of the second defendant as follows:

- ruined their fruit trees;
- failed to install sewerage pipes as promised resulting in residual water spilling over and flooding their orchard;
- discharged and disposed of pumped residual water from out of the manhole onto the ground; and
- caused the drain in the orchard to be clogged with rubbish and mud.

[84] PW1, in her evidence, stated that the second defendant had given their assurance to her and promised to compensate the plaintiffs for the damage and loss but they had reneged on their word.

[85] The existence of the manhole situated inside of the plaintiffs' land cannot be disputed. PW2, who visited the land, confirmed the existence of the hole and he included it into the survey report which he prepared. The survey report dated 14 December 2017 showed the location of the hole in question, confirming that it is located within the boundary of the plaintiffs' land based on the coordinates of the land as stated in the land title.

[86] PW5, the independent contractor, confirmed the existence of the manhole and further gave evidence that he saw the sheet piles lying on the plaintiffs' land. DW1, on the other hand, could not confirm with certainty that the sheet piles had been removed as he had never been to the land. DW1 agreed that the second defendant had no documentation to substantiate those denials.

[87] As it stands, the evidence of DW1 as the sole witness was of no assistance to the second defendant's case as DW1 had no personal knowledge of the existence of the manhole, the condition of the land and the flooding.

[88] As it is, this court is of the view that the plaintiffs have proven their claim for damages as they have shown that they were gravely affected and prejudiced by the acts of the second defendant. I am satisfied and I make the finding that the plaintiffs have proven the damages suffered even though there is scanty documentary evidence to support their assertions. I found the evidence of both the witnesses *ie*, PW1 and PW3 to be credible and reliable. To me, from my observation of their demeanour, they were honest-to-

goodness village folk and they were unwavering and candid in their testimonies even when it was to their detriment. I preferred and believed their version of the disputed facts that occurred.

RM10,000: Loss Of Vegetation And Damage Due To Flooding

[89] In this case there was no evidence shown of the extent of the damage caused to the vegetation and the land. Hence, this court is of the view that while the plaintiffs have proven damage was caused, there is a scarcity of the quantification of the damages. The plaintiffs claim a sum of RM10,000 for this loss. It is nevertheless the view of this court that the plaintiffs have proven the contravention of their right and for that reason, nominal damages would be the most appropriate relief to be awarded. In the particular facts and circumstances of this case, this court will award a nominal sum of RM2,500 for loss of vegetation and damage due to flooding.

Claim For Loss Of Rental: RM90,000

[90] In regard to the claim for loss of rental at RM2,500 per month, this court takes note of the evidence given by DW1 where he confirmed that RM2,500 per month was offered to the plaintiffs as a rental for using the plaintiffs' land and as such, that sum will be accepted as the amount payable for trespass of the land. It is a justified sum and not a sum plucked out of the air. The court allows the claim for loss of rental at RM2,500 per month from June 2015 to June 2018 which is a period of 36 months altogether which brings it to a total of RM190,000.

Cost Of Rectification : RM265,000

[91] The plaintiff sought the sum of RM265,000 being cost of rectification works. This amount is based on a quotation provided by PW5, a private and independent contractor. The quotation is at p. 324 B2 and marked as exh. P5. In my view, the plaintiffs have provided proof of the damages by producing the said quotation prepared by PW5 to support their claim for the costs of rectification. PW5 was closely cross-examined and despite that he came out unscathed. He stood his ground while under cross-examination and I am of the firm view that his reasons for charging that amount are sound and has basis. His evidence is highly probable and is consistent with logic and common sense. Thus, I was convinced that the said sum is a reasonable figure in order for him to effectively remedy and rectify the damage caused and left behind by the second defendant. Hence I do not see it to be an unreasonable sum nor is it a wildly unfair figure as alleged by counsel for the second defendant.

[92] In any event, the second defendant did not produce any counter quotation to rebut that claim. In the absence of rebuttal evidence, it does not lie in the mouth of the second defendant to deny the plaintiffs' claim or to

retort that the sum claimed is unreasonable or wildly unfair when they themselves did not produce any documentary evidence to counter that sum claimed.

Aggravated Damages Due To Trespass

[93] The plaintiffs also sought the court's discretion to order aggravated damages against the second defendant for having caused severe detriment to the plaintiffs, resulting in deprivation of the use of part of their land.

[94] I find that the plaintiffs' claim for aggravated damages is justified and warranted. The second defendant had ignored the plaintiffs' letters to them to leave the land. Not only did they ignore the revocation of the earlier consent given by the plaintiffs, the second defendant continued to flagrantly trespass onto the plaintiffs' land and caused damage to the land, making it impossible for the plaintiffs to enjoy peaceful and quiet enjoyment of the land. The plaintiffs were deprived of the use of part of their land until to date. The second defendant's acts were serious and deliberate, caring only for economic reward and commercial gains for themselves. Depriving the plaintiffs of the use of their land is in the realm of exceptional oppressive and contumelious conduct on the part of the second defendant, especially since they had no concern for the constitutional rights of the plaintiffs. They acted in a high-handed manner without any care and concern for the feelings of the plaintiffs. In my judgment, these circumstances sufficiently justified an award of aggravated damages to be meted out.

[95] I am aware that there is no fixed formula or rate for awarding aggravated damages for the tort of trespass. There is no exact science to be applied in assessing such damages. However, not to award damages would in my mind not vindicate the law and the breach of the plaintiffs' rights. Bearing all these concerns in mind and with careful consideration, I was of the view that a sum of RM80,000 is a reasonable sum as compensation for all the distress, inconvenience and hardship all this while suffered by the plaintiffs. It is a sum I consider to be fair, not excessive and is modest commensuration for the plaintiffs' loss.

Conclusion

[96] For the reasons above, I allowed the plaintiffs' claim and having quantified the damages, the plaintiffs are entitled to damages in the aggregate sum of RM440,680, together with interest and costs.